

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

JAMES ARCENEUX,

Petitioner,

versus

DIRECTOR, TDCJ-ID,

Respondent.

CIVIL ACTION NO. 1:18-CV-246

**MEMORANDUM ORDER OVERRULING OBJECTIONS AND ADOPTING
THE MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION**

James Arceneaux, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court previously referred this matter to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of the court. The magistrate judge has submitted a Report and Recommendation of United States Magistrate Judge recommending the petition be denied.

The court has received the Report and Recommendation of United States Magistrate Judge, along with the record, pleadings, and all available evidence. Petitioner filed two sets of objections to the Report and Recommendation. The court must therefore conduct a *de novo* review of the objections in relation to the pleadings and the applicable law.

The magistrate judge recommended that certain of petitioner's grounds for review be dismissed as procedurally barred and that two grounds for review be denied on the merits.

In one of his grounds for review, petitioner asserted the trial judge improperly told the jury to either find petitioner guilty or pay a small penalty. The magistrate judge recommended this ground for review be denied because there was no evidence in the record to support it. Despite petitioner's objections, the court agrees. The transcript does not contain the remarks petitioner describes. Petitioner's own self-serving statement is the only evidence that supports his claim. Such evidence is insufficient to provide a basis for relief in this proceeding.

In his objections, petitioner raises grounds for review which were not presented to the Texas Court of Criminal Appeals or previously in this proceeding. As the Court of Criminal Appeals would reject as an abuse of the writ a subsequent application asserting these grounds for review, *Ex parte Barber*, 879 S.W.2d 889, 892 n.1 (Tex.Crim.App. 1994), consideration of these grounds for review is procedurally barred. *Emery v. Johnson*, 139 F.3d 191, 195 (5th Cir. 1997).

ORDER

Accordingly, the objections filed by petitioner are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered dismissing the petition.

In addition, the court is of the opinion petitioner is not entitled to a certificate of appealability. An appeal from a final judgment denying habeas relief may not proceed unless a certificate of appealability is issued. *See* 28 U.S.C. § 2253. The standard for a certificate of appealability requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, the petitioner is not required to establish that he would prevail on the merits. Rather, he must demonstrate that the issues raised in the petition are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).

In this case, the petitioner has not shown that the issues raised by petitioner are subject to debate among jurists of reason. The factual and legal questions raised by petitioner have been consistently resolved adversely to his position and the questions presented are not worthy of

encouragement to proceed further. As a result, a certificate of appealability shall not issue in this matter.

SIGNED at Beaumont, Texas, this 2nd day of August, 2021.

A handwritten signature in black ink, reading "Marcia A. Crone". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE